

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

ARMADA CONCRETE, LLC,  
Plaintiffs,  
vs.  
JAYNES CORPORATION; WESTERN SURETY  
COMPANY,  
Defendants.

Case No.: 2:14-cv-02176-GMN-GWF

## ORDER

10 JAYNES CORPORATION,  
11 Third-Party Plaintiff,  
12 vs.  
13 LIBERTY MUTUAL INSURANCE COMPANY,  
14 Third-Party Defendant.  
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16 JAYNES CORPORATION,  
17 Counter Claimant,  
18 vs.  
19 ARMADA CONCRETE, LLC,  
20 Counter Defendant.  
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Pending before the Court is the Emergency Motion to Reconsider, (ECF No. 111), filed by Defendants Jaynes Corporation and Western Surety Company (collectively “Jaynes”). Jaynes asks the Court to reconsider its ruling granting the Motion in Limine, (ECF No. 82),

1 filed by Plaintiff Armada Concrete, LLC (“Armada”). Because trial in this matter is set to  
2 begin on May 15, 2017, Jaynes seeks expedited consideration of its Motion. For the reasons  
3 discussed below, the Court DENIES the Motion.

4 **I. BACKGROUND**

5 On May 2, 2017, during Calendar Call in this case, the Court heard oral argument on the  
6 parties’ Motions in Limine. Armada’s only Motion in Limine sought to preclude Jaynes from  
7 offering evidence in support of its counter-claim for liquidated damages. (*See* Pl.’s Mot. in  
8 Limine (“MIL”) 10:2–3, ECF No. 82). Specifically, Armada complained that Jaynes had failed  
9 to comply with Federal Rule of Civil Procedure 26(a)(1)(A) by: (1) failing to properly disclose  
10 the identity of its person most knowledgeable (“PMK”) of its liquidated damages claim, Rick  
11 Marquardt (“Marquardt”), Jaynes’ president; (2) failing to timely disclose any evidence  
12 supporting its liquidated damages claim; and (3) not providing a computation of damages.  
13 Armada asserted that only after discovery had closed, and following the settlement conference  
14 before the magistrate judge, did Jaynes formally name Marquardt as a witness and disclose  
15 documents related to liquidated damages. Armada therefore sought to exclude all evidence of  
16 liquidated damages pursuant to Federal Rule of Civil Procedure 37(c)(1).

17 During Calendar Call, the Court asked Jaynes to identify what information it had  
18 disclosed regarding the liquidated damages claim that complied with Rule 26. Jaynes pointed  
19 to Armada’s Exhibit 403, a document obtained by Armada from the United States Corps of  
20 Engineers through a Freedom of Information Act (“FOIA”) request. Jaynes also argued that  
21 although Marquardt had never been formally identified as a PMK during discovery, it had  
22 named Marquardt as a PMK regarding liquidated damages during Armada’s 30(b)(6)  
23 deposition of Jaynes. Finally, Jaynes argued that Armada did have the calculation for  
24 liquidated damages as Armada could simply multiply the number of delay days in the  
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1 underlying construction project by the liquidated damages rate disclosed in the parties'  
2 contract.

3 After considering the parties' arguments on the matter, the Court determined that  
4 Jaynes' disclosures failed to comply with Rule 26(a) and granted Armada's Motion in Limine  
5 to exclude all evidence supporting Jaynes' liquidated damages claim pursuant to Rule 37(c)(1).  
6 (See Minute Order, ECF No. 98). In the instant Motion, Jaynes asks the Court to reconsider its  
7 ruling.

8 **II. LEGAL STANDARD**

9 “[A] motion for reconsideration should not be granted, absent highly unusual  
10 circumstances.” *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003). Reconsideration is  
11 appropriate where: (1) the court is presented with newly discovered evidence, (2) the court  
12 committed clear error or the initial decision was manifestly unjust, or (3) if there is an  
13 intervening change in controlling law. *School Dist. No. 1J, Multnomah County v. ACandS, Inc.*,  
14 5 F.3d 1255, 1263 (9th Cir. 1993). However, a motion for reconsideration is not a mechanism  
15 for rearguing issues presented in the original filings, *Backlund v. Barnhart*, 778 F.2d 1386,  
16 1388 (9th Cir. 1985), or “advancing theories of the case that could have been presented earlier,  
17 *Resolution Trust Corp. v. Holmes*, 846 F. Supp. 1310, 1316 (S.D. Tex. 1994). Thus, Rules  
18 59(e) and 60(b) are not “intended to give an unhappy litigant one additional chance to sway the  
19 judge.” See *Durkin v. Taylor*, 444 F. Supp. 879, 889 (E.D. Va. 1977).

20 **III. DISCUSSION**

21 Jaynes argues that “reconsideration is appropriate because the Order is not supported by  
22 the requisite considerations and findings, and the required analysis demonstrates that exclusion  
23 of all evidence supporting Jaynes’ liquidated damages claim is inappropriate.” (Mot. to  
24 Reconsider 4:11–13, ECF No. 111). Although the Court finds no reason to overturn its original  
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1 ruling, the Court nevertheless discusses its reasoning for excluding evidence pertaining to  
2 liquidated damages in more detail herein.

3 Rule 26 violations are subject to the sanctioning power of Rule 37. *See Fed. R. Civ. P.*  
4 37(c). Rule 37 is described as a self-executing, automatic sanction that is intended to provide a  
5 strong inducement for disclosure of material. *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259  
6 F.3d 1101, 1106 (9th Cir. 2001). In particular, Rule 37(c)(1) provides that when a party  
7 violates Rule 26, it “is not allowed to use that information or witness to supply evidence . . . at  
8 a trial, unless the failure was substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1).  
9 “[T]he burden is on the party facing the sanction . . . to demonstrate that the failure to comply  
10 with Rule 26(a) is substantially justified or harmless.” *Torres v. City of L.A.*, 548 F.3d 1197,  
11 1213 (9th Cir. 2008).

12 The Ninth Circuit gives wide latitude to the district court’s discretion to issue sanctions  
13 under Rule 37(c)(1). *Yeti*, 259 F.3d at 1106. If precluding the evidence would cause a claim to  
14 be dismissed, district courts are required to consider whether the violation involved willfulness,  
15 fault, or bad faith, and also to consider the availability of lesser sanctions. *R & R Sails, Inc. v.*  
16 *Ins. Co. of Pa.*, 673 F.3d 1240, 1247 (9th Cir. 2012). “Courts are more likely to exclude  
17 damages evidence when a party first discloses its computation of damages shortly before trial  
18 or substantially after discovery has closed.” *Jones v. Wal-Mart Stores, Inc.*, No. 2:15-cv-1454-  
19 LDG-GWF, 2016 WL 1248707, at \*4 (D. Nev. Mar. 28, 2016).

20 Jaynes presents several arguments that its noncompliance with its disclosure obligations  
21 was harmless and not in bad faith. First, Jaynes contends that the parties engaged in  
22 “significant” and “extensive” discovery on the issue of liquidated damages. (Mot. to  
23 Reconsider 4:11–13). Jaynes fails to identify what exchanges qualify as “significant” and  
24 “extensive” discovery. By its own admission, the only timely disclosed evidence compliant  
25 with Rule 26 is a document procured by Armada through its own due diligence. Rule 26

1 clearly places the onus on the proponent of a claim to comply with disclosure requirements  
2 supporting that claim. *See, e.g., Carrillo v. B & J Andrews Enters., LLC*, No. 2:11-cv-01450-  
3 RCJ, 2013 WL 420401, at \*3 (D. Nev. Jan. 31, 2013) (“It is the burden of the disclosing party  
4 to provide accurate, timely, and sufficient Rule 26(a)(2)(B) disclosures. “); *Nihart v. Nat’l Park*  
5 *Serv.*, No. 2:12-CV-00291-APG, 2014 WL 1415198, at \*2 (D. Nev. Apr. 10, 2014) (“The  
6 burden was on [the party asserting the claim] to comply with Rule 26(a)(2)(A) and (C).”). To  
7 place the burden otherwise is nonsensical.

8 Second, Jaynes argues that its failure to disclose any evidence compliant with Rule 26  
9 amounts to “excusable neglect and oversight” because “Jaynes’ counsel did not reasonably  
10 believe that a separate disclosure of the same document already disclosed was necessary or  
11 required under the Rules.” (Mot. to Reconsider 5:25–26, 6:15–16). Further, Jaynes contends  
12 that “Armada had all the information necessary to calculate liquidated damages.” (*Id.* 6:25).  
13 The flaws in these arguments are twofold. First, Jaynes does not explain how Armada’s  
14 discovery of one document pertaining to liquidated damages completely absolves Jaynes of its  
15 disclosure responsibilities as to other documents in its possession. Second, Jaynes again places  
16 the burden on Armada to meet its own obligation to provide a damages calculation; however,  
17 hoping that Armada surmises Jaynes’ method of calculating damages does not discharge Jaynes  
18 of Rule 26’s requirements.

19 Third, Jaynes asserts that it did disclose a PMK in its initial disclosures, Stephen Brooke  
20 (“Brooke”), and later specifically identified Marquardt as a PMK regarding liquidated damages  
21 during Brooke’s deposition. (*Id.* 8:17–24). Jaynes’ initial disclosures, however, identified  
22 Brooke as a witness “expected to testify as to facts and information pertinent to this litigation,  
23 the complaint, claim, *counterclaims*, and defenses.” (Ex. 7 to Mot. to Reconsider 3:19–20, ECF  
24 No. 111-7) (emphasis added). Further, Armada’s 30(b)(6) request to Jaynes requested a PMK  
25 for liquidated damages, and Jaynes provided Brooke. Jaynes does not deny the Brooke is not a

1 PMK for liquidated damages, and its first initial disclosure is therefore irrelevant as to its  
2 untimely disclosure of Marquardt.

3 The Court concludes that Jaynes' failure to comply with its Rule 26(a) disclosure  
4 obligations was the result of willfulness, fault, or bad faith. It is clear that Jaynes intentionally  
5 made disclosures designed to give as little information as possible despite the requirements of  
6 Rule 26(a). In most instances, however, Jaynes made no disclosure at all but instead relied on  
7 Armada to cobble together the substance of Jaynes' liquidated damages claim. Indeed, to the  
8 Court's knowledge Jaynes has yet to provide a calculation of damages. Under these  
9 circumstances, the Court finds that Jaynes' failure to comply with its Rule 26(a)(2) disclosure  
10 obligations was, at a minimum, a result of refusal to provide the information required under  
11 Rule 26(a)(1)(A) and erroneous reading of Rule 26(a).

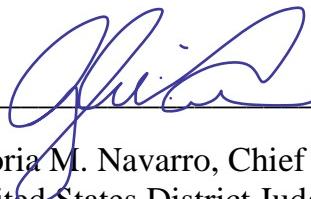
12 Finally, the Court finds that no lesser sanction other than exclusion of evidence related  
13 to Jaynes' liquidated damages claim is suitable. While the Court could simply shift the costs of  
14 Jaynes' noncompliance to Jaynes, substantial delay would occur in a case where the parties  
15 have already received many stipulations to continue deadlines as well as trial and more time  
16 than deemed presumptively reasonable to complete discovery. It would require reopening  
17 discovery, establishing new deadlines, and disrupting the Court's management of its docket on  
18 the eve of trial. It would also impact the integrity of the Court's orders. Parties are simply not  
19 at liberty to ignore the Court's discovery plan and scheduling order deadlines without  
20 consequence. Had Jaynes made some effort to make the required disclosures, the Court might  
21 be influenced to impose lesser sanctions. However, as indicated, the disclosures Jaynes made  
22 in this case were so unhelpful, misleading, or nonexistent that Armada could not reasonably be  
23 expected to prepare a meaningful defense to Jaynes' liquidated damages claim. For these  
24 reasons, the Court finds that, although preclusion sanctions are dispositive, they are warranted.  
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1           In short, after reviewing the record in this case, the Court has found no reason to  
2 overturn its previous Order. The Court finds neither clear error nor manifest injustice in the  
3 reasoning of its previous Order. Accordingly, Plaintiff's Motion to Reconsider is denied.

4       **IV. CONCLUSION**

5       **IT IS HEREBY ORDERED** that Jaynes' Motion for Reconsideration, (ECF No. 111),  
6 is **DENIED**.

7       **DATED** this 9 day of May, 2017.

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12           Gloria M. Navarro, Chief Judge  
13           United States District Judge